SUPREME COURT, U. S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-367

LOOKOUT, INC., a California corporation, dba THE LOOKOUT; CAROLINA [illegible], a California corporation, dba CAROLINA LANES; and MAVERICK TAVERN, INC., a California corporation, dba THE WILD GOOSE,

Petitioners,

vs.

THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; EDWARD J. KIRBY, THE DIRECTOR OF THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; LEONARD COLLEN and CHARLES STANLEY, DISTRICT ADMINISTRATORS OF THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No._____

LOSERS, INC., a California corporation, dba THE LOSERS; CAROLINA ENTERPRISES, a California corporation, dba CAROLINA LANES; and MAVERICK TAVERN, INC., a California corporation, dba THE WILD GOOSE,

Petitioners,

vs.

THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; EDWARD J. KIRBY, THE DIRECTOR OF THE STATE OF CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL; LEONARD COLLEN and CHARLES STANLEY, DISTRICT ADMINISTRATORS OF THE CALIFORNIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,

Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, LOSERS, INC., a California corporation, dba THE LOSERS; CAROLINA ENTERPRISES, a California corporation, dba CAROLINA LANES; and MAVERICK

TAVERNS, INC., a California corporation, dba THE WILD GOOSE, pray that a Writ of Certiorari issue to review the decision of the Court of Appeal of the State of California, Second Appellate District.

JURISDICTION

The decision sought to be reviewed herein is a summary post-card denial of Petition for Writ of Mandate pursuant to §23090.5 of the California Business & Professions Code which is dated May 3, 1973, (Appendix "A"), but which was given finality for purposes of this Petition on May 30, 1973, when the Supreme Court of the State of California exercised its discretion adversely to Petitioners by denying their Petition for Hearing. (Appendix "B").

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

QUESTION PRESENTED FOR REVIEW

1. May the State of California, by rules and regulations of the State of California Department of Alcoholic Beverage Control, constitutionally proscribe the specific and invariable nude dance performances herein which are not obscene but which are presented in premises which the state licenses to sell alcoholic beverages?

Is the State of California, Department of Alcoholic Beverage Control Regulation 143.3 constitutional as applied?

CONSTITUTIONAL AND STATUTORY PROVISIONS.

This case involves the following constitutional and statutory provisions:

1. The First Amendment of the Constitution of the United States provides as follows:

> "Congress shall make no law . . . abridging the freedom of speech, . . .".

2. The Fourteenth Amendment of the Constitution of the United States provides as follows:

> "Section 1. . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. §23090.5 of the California Business & Professions Code provides as follows:

> "No court of this state, except the Supreme Court and the courts of appeal to the extent specified in this article, shall have jurisdiction to review, affirm, reverse, correct, or annul

any order, rule, or decision of the department or to suspend, stay, or delay the operation or execution thereof, or to restrain, enjoin, or interfere with the department in the performance of its duties, but a writ of mandate shall lie from the Supreme Court or the courts of appeal in any proper case."

4. State of California, Department of Alcoholic Beverage Control Regulation No. 143.3 provides as follows:

"ENTERTAINERS AND CONDUCT. Acts or conduct on licensed premises in violation of this rule are deemed contrary to public welfare and morals, and therefore no on-sale license shall be held at any premises where such conduct or acts are permitted.

"Live entertainment is

permitted on any licensed premises, except that:

"(1) No licensee shall permit any person to perform acts of or acts which simulate:

"(a) Sexual intercourse, masturbation, sodomy, bestiality, oral copulation, flagellation or any sexual acts which are prohibited by law.

"(b) The touching, caressing or fondling on the breast, buttocks, anus or genitals.

"(c) The displaying of the pubic hair, anus, vulva or genitals."

STATEMENT OF THE CASE

This case involves the constitutionality of the State of California Department of Alcoholic Beverage Control (hereinafter referred to as "DEPARTMENT") Regulation 143.3, as applied to the specific and invariable nude dance performances, an exact motion picture film replica of which is part of the record herein, and which are not obscene, which do not involve any semblance of "bacchanalian revelries" but which are presented in premises which the State licenses to sell alcoholic beverages.

The question here sought to be reviewed was raised at the very outset of this case when, on February 27, 1973, all of the petitioner nightclub owners herein filed a complaint for solely declaratory relief in the Superior Court of the State of California, for the County of Los Angeles, (Case No. C50879) wherein petitioners

sought a judicial declaration that Regulation 143.3 could not be constitutionally applied to petitioners' specific and invariable dance performances which were reproduced by motion picture film attached as an exhibit to petitioners' complaint.

On or about April 24, 1973, the Superior Court sustained, without leave to amend, a Demurrer to the Complaint on the ground that the Court was without jurisdiction in the premises by virtue of California Business & Professions Code §23090.5.

Thereafter, on April 30, 1973, petitioners filed a Petition for Writ of Mandate pursuant to California Business & Professions Code §23090.5 in the Court of Appeal of the State of California, Second Appellate District, wherein petitioners sought the same judicial declaration as aforesaid or in the alternative, that the

Superior Court be ordered to exercise its jurisdiction in the matter. This petition was denied by postcard dated May 3, 1973. (Appendix "A").

Subsequent thereto, petitioners filed a Petition for Hearing in the Supreme Court of the State of California and such was also denied by postcard dated May 30, 1973. (Appendix "B").

REASONS FOR THE ALLOWANCE OF THE WRIT.

1. THE DEPARTMENT'S REGULATION 143.3 IS UNCONSTITUTIONAL AS APPLIED TO THE SPECIFIC AND INVARIABLE DANCE PERFORMANCES HEREIN IN THAT SUCH APPLICATION IS VIOLATIVE OF THE FIRST AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

Petitioners respectfully submit that as this Court indicated in CALIFORNIA

V. LaRUE, 409 U. S. 109, 93 S. Ct. 390, 397, although Regulation 143.3 is valid on its face, its application to the dance performances herein engenders "concrete problems of constitutional dimension."

However, as of this Petition, Petitioners have not been afforded their day in Court with regard to this issue and Petitioners humbly ask this Court not to turn a deaf ear upon Petitioners' assertions of their constitutional rights.

In direct contrast to the factual and evidentiary context of LaRUE, SUPRA, the performances herein constitute communicative expression and entertainment rather than "gross sexuality" or "hard-core pornography". Clearly, the mere exposure of the nude, human form is not and never has been held to be obscene or lewd within the context herein in that nudity itself, absent sexual activity, does not constitute obscenity.

See MILLER V. CALIFORNIA, ___ U.S. ___, No. 70-73, SUNSHINE BOOK CO. V. SUMMERFIELD, 355 U. S. 372, 78 S. Ct. 365, rev'g 249 F. 2d 114; MANUAL ENTERPRISES V. DAY, 270 U. S. 478, 82 S. Ct. 1432; TIMES FILM CORP. V. CITY OF CHICAGO, 355 U. S. 35, 78 S. Ct. 115; PEOPLE V. NOROFF, 67 Cal. 2d 791.

Dating at least from the decision of this Court in 1948, in WINTERS V. NEW YORK, 33 U. S. 507, 510; 68 S. Ct. 665 (wherein it was held that the line between informing and entertaining is too elusive to be drawn in terms of First Amendment protection); and confirmed by this Court's decision in JOSEPH BURSTYN, INC. V. WILSON 343 U. S. 495, 72 S. Ct. 777, the principle that "communicative entertainment" is a form of expression protected by the First Amendment has never been doubted. Consonant with this principal and as indicated in CALIFORNIA V. LaRUE, SUPRA,

Petitioners submit that the dance, no less than any other dramatic stage productions, motion pictures, books or magazines, is protected by the First Amendment unless obscene under MILLER, SUPRA, simply because the First Amendment protects freedom of expression no matter how plebian the setting and whether such be informative or merely entertaining. SCHACT V. UNITED STATES, 398 U. S. 58, 90 S. Ct. 1555.

This protection of the dance must necessarily follow from its very nature for a common thread woven throughout the history of the dance is that it is an expression of emotions.

> "Dancing consists in the rhythmical movements of any and all parts of the body in accordance with some scheme of individual or concerted action which is expressive of emotions or ideas."

7 ENCYCLOPEDIA BRITTANICA (1945) 13-14.

> "The twentieth century has rediscovered the body; not since antiquity has it been so loved, felt and honored. Nobody really aware of what is taking place today needs to be told this . . . our generation does not find what it wants in the ballet . . . [and] in gossamer skirts. It cries out . . . for nature and passion."

SACHS, WORLD HISTORY OF THE DANCE, p. 477 (1963).

Thus, the dance itself must be protected by the First Amendment and petitioners respectfully submit that the nude dancing herein is not per se beyond the protection of the First Amendment such that these particular performances can be proscribed without any requirement that such be obscene under MILLER, SUPRA.

Surely the Twenty-First Amendment does not repeal the First Amendment and allow the application of Rule 143.3 to the particular and specific communicative performances herein.

Petitioners respectfully submit that the application of Rule 143.3 to the specific and particular performances herein indeed engenders "concrete problems of constitutional dimension" (LaRUE SUPRA), which have indeed now arisen and are ripe to be dealt with by this Court.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that this Court issue a Writ of Certiorari in the instant case.

Respectfully submitted,

LAW OFFICES OF HARRISON W. HERTZBERG

By (S) HARRISON W. HERTZBERG
HARRISON W. HERTZBERG
Attorneys for Petitioners.

Los Angeles, Cal. ....., 19

TITLE { Loser, Inc., etc., et al
Superior Court L.A.CO. } No. 42138

THE COURT: Petition for writ of mandate denied.

CLAY ROBBINS, *Clerk*

11325-112 8-73 8M ⓓ OBP

APPENDIX "A"

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

MAY 30 1973

DEAR SIR: *I have this day filed Order*

HEARING DENIED

In re: 2 Civ. No. 42138

Losers, Inc.

vs.

Superior Ct., Los Angeles

Respectfully,

G. E. BISHEL
Clerk

67783-977 10-72 5M OSP

APPENDIX "B"



County of Los Angeles }ss

_____, being first duly sworn, says: That he is and was at all times herein mentioned, a citizen of the United States and employed in the County of _____, a resident of _____, over the age of eighteen years and not a party to the within action or proceeding; that [1] h_____ ~~residence~~ business address is _____ that on August 27, 19 73, he served the within _____

JOSHUA KAPLAN certifies that he is and was, at all times herein mentioned, an active member of the State Bar of California and not a party to the within action or proceeding; that [1] his business address is 3550 Wilshire Boulevard, Suite 1418, Los Angeles, CA 90010, that on August 27, 19 73, he served the within PETITION FOR WRIT OF CERTIORARI

on the Respondents in said action or proceeding by depositing a true copy thereof, inclosed in a sealed envelope with postage thereon fully prepaid, in a mail-box, sub-post office, substation, or mail chute (or other like facility), regularly maintained by the Government of the United States at [2] _____, in the City of Los Angeles, California addressed to the attorney of record for said Respondents at the residence address of said attorney / office _____, as follows: [3] " Evelle J. Younger, Atty. Gen.
Alvin J. Korobkin, Deputy Atty. Gen.
1350 Front Street
San Diego, California "

_____
(Affiant's Signature)

Subscribed and sworn to before me August 27, 19 73

_____
(Attorney's Signature)

_____
NAME (TYPED OR PRINTED)

Notary Public in and for County of _____, State of California.[4]
(SEAL)

[1] Unless unusual circumstances exist, the portion that follows is the same in wording whether the affidavit or certificate is used. However, only business address may be shown if certificate is used.
[2] If deposited in the United States Post Office, cross out appropriate words and insert "in the United States Post Office". [3] Here quote from envelope name and address of addressee. [4] Notarization is essential only with the affidavit.